Supreme Court, U. S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1980

No. 79-1879

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

No. 79-1879

THE BOHACK CORPORATION,

~~Intervenor~~-Petitioner,

v.

IOWA BEEF PROCESSORS, INC.,

~~Plaintiff~~-Respondent,

-against-

HUGHES A. BAGLEY,

~~Defendant~~-Respondent,

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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**IN THE**
**SUPREME COURT OF THE UNITED STATES**
**OCTOBER TERM, 1980**

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NO.

THE BOHACK CORPORATION,

*Intervenor-Petitioner,*

IOWA BEEF PROCESSORS, INC.,

*Plaintiff-Respondent,*

-against-

PATRICK E. GORDON, HARRY R. POOLE, and SAM TALARICO, as representatives of the members of AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO; IRVING STERN; ALBERT J. KRIEGER; LEX HAWKINS; JOHN A. COCHRANE; HUGHES A. BAGLEY; and HANS AARSEN,

*Defendants.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner, The Bohack Corporation, requests that a writ of certiorari issue to review the order of the United States Court of Appeals for the Eighth Circuit, which dismissed, for lack of jurisdiction, Petitioner's appeal

from an order of the Hon. Edward J. McManus, United States District Judge for the Northern District of Iowa, Western Division, entered on September 25, 1979. That order denied that branch of Petitioner's motion for intervention and modification of an existing order that sought modification of the District Court's protective order dated February 13, 1978, to allow issuance of a subpoena duces tecum upon Hughes A. Bagley, a party to the Iowa action, and production of documents in his possession, for Petitioner's use in an action pending in the District Court for the Eastern District of New York, "The Bohack Corporation v. Iowa Beef Processors, Inc., et al" (77 Civ. 1673).

## THE OPINIONS BELOW

(a)

The order of the District Court entered on September 25, 1979, stated in pertinent part as follows:

> "With respect to the February 13, 1978 protective order, it must be initially noted that this court's prior limited modification of the order in another context[2] has been vacated on appeal to the Eighth Circuit Court of Appeals. See *Iowa Beef Processors, Inc. v. Bagley,* No. 78-1855 (8th Cir., February 7, 1979). In

2. On November 27, 1978, this court modified the February 13 protective order to permit the House Subcommittee on SBA and SBIC Authority and General Small Business Problems to obtain by subpoena documents held by defendant Hughe A. Bagley that were the subject of the protective order. Iowa Beef Processors, Inc. appealed that modification and the Eighth Circuit Court of Appeals vacated the modification order and remanded to this court 'with instructions to reinstate in full the protective order entered on February 13, 1978.'

furtherance of that appellate decision the Eighth Circuit Court of Appeals mandated this court to reinstate the February 13, 1978 protective order in full.

The mandate was based in part upon the Appeals Court's view:

> 'That the documents ordered disclosed to the [House] Subcommittee [on SBA and SBIC Authority and General Small Business Problems] were an important part of the subject matter of the underlying lawsuit. That is, IBP [Iowa Beef Processors, Inc.] alleged that Bagley had breached both contractual and fiduciary obligations to IBP by disclosing the contents of these documents and sought an injunction preventing further disclosure and compelling the return to IBP of all such documents. In these circumstances, the district court should have maintained the status quo by carefully limiting disclosure of these documents pending determination of the merits of IBP's claim. The court's order allowing disclosure to the Subcommittee, without any limitation on its use of the documents, could well render moot in part IBP's claims for relief in the underlying lawsuit.'

*Id.* at slip op. pp. 10-11.

That decision and rationale were seconded in the Appeals Court's opinion on a petition for rehearing. See *Iowa Beef Processors, Inc. v. Bagley,* No. 78-1855 (8th Cir., August 13, 1979)[3] Compare also,

---

3. Moreover, in its opinion on the petition for rehearing, Appeals Court indicated:

> 'We are confident that any future attempt bu Bagley to seek permission to disclose any further information regarding these documents will be dealt with by the district court in accordance with the considerations discussed in our earlier opinion.'

This court assumes the Appeals Court would express the same expectations with respect to this court's consideration of motions to modify made by intervening non-litigant third parties." (A3, 4)

*Iowa Beef Processors, Inc. v. Bagley,* 588 F.2d 638 (8th Cir. 1978)

Thus, with respect to any and all requests for modification of its February 13, 1978 protective order, this court considers itself bound by the Eighth Circuit Court of Appeals' views. Bohack's motion for leave to intervene will be granted as limited and its motion to modify will be, denied."

(b)

In dismissing the appeal on February 28, 1980 (A13-15), the Eighth Circuit Court of Appeals stated (A14):

"Now the Bohack Corporation, appearing as intervenor-appellant, appeals a further order of the district court denying appellant's motion to modify the protective order.[1] Specifically, appellant seeks clarification of this court's prior orders and a ruling that the district court may modify its protective order to accommodate appellant's request for discovery.

Clearly the order complained of is a nonfinal interlocutory action appealable, if at all, only upon certification by the district court pursuant to 28 U.S.C. §1292(b). No such certification is shown, and thus we dismiss for lack of jurisdiction.[2]"

1. The district court granted that part of intervenor-appellants' motion requesting that it be allowed to intervene, but denied that portion of the motion seeking modification of the protective order.

2. While acknowledging that the order in question is not final, appellant urges us to recognize an exception to the general requirement of finality in cases where, as here, a request for discovery is denied in an ancillary forum. *See e.g., Premium Service Corp. v. Sperry & Hutchinson Co.,* 511 F.2d 225 (9th Cir. 1975); *Republic*

## JURISDICTION

The jurisdiction of this court is invoked, made and confirmed under 28 U.S.C. 1254(1) and Rule 22(3) of the Rules of this court. The Court of Appeals order was entered on February 28, 1980.

## QUESTIONS PRESENTED

1. Where Petitioner seeks modification of a protective order in a case pending in the Northern District of Iowa, as part of its ancillary proceeding for discovery to obtain evidence for use in another action pending in the Eastern District of New York, is the denial of that application by the District Judge in Iowa appealable as of right to the Eighth Circuit Court of Appeals?

2. Does a Circuit Court have discretion to refuse to hear an appeal presented to it from the denial of discovery in a proceeding ancillary to the case in chief in which the appellant seeks to use the evidence obtained through the proposed discovery.

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(Footnote 2 continued)

*Gear Co. v. Borg-Warner Corp.*, 381 F.2d 551 (2d Cir. 1967); *Westinghouse Electric Corp. v. City of Burlington*, 351 F.2d 762 (D. C. Cir. 1965); 4 Moore's Federal Practice ¶ 26.83[5] (1979). We believe, however, that this is not an appropriate case to apply the exception. The issues raised here are closely akin to those presented in the underlying litigation and only recxently considered by this court in *Iowa Beef Processors v. Bagley, supra. Cf. Westinghouse Electric Corp. v City of Burlington, supra,* 351 F.2d at 766 (issues involved were separable from those involved in the main case).

Appellant raises no claim under the All Writs Act, and we see no basis for applying that Act here.

## THE PRINCIPAL STATUTE INVOLVED

Judiciary and Judicial Procedure

§1291. Final decisions of district courts

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. As amended Oct. 31, 1951, c. 655, §48, 65 Stat. 726; July 7, 1958, Pub. L. 85-508, §12(e), 72 Stat. 348.

## STATEMENT OF CASE

Petitioner moved for leave to intervene in the District Court, Western District of Iowa, for the limited purpose of modifying a protective order, previously entered on February 13, 1978, in that court, and compelling a witness who is a party in the Iowa action to appear for a deposition under oath, to give testimony on behalf of the Petitioner, and to produce for discovery and inspection such records and documents as are in his possession that relate to the issues in an anti-trust action, presently pending in the United States District Court, Eastern District of New York, captioned "THE BOHACK CORPORATION, plaintiff, v. IOWA BEEF PROCESSORS, INC., WALDBAUM, INC., C.P. SALES, INC., WALTER BODENSTEIN and IRA WALDBAUM, defendants" bearing civil action number 77 Civ. 1673 (J.M.). The records and documents sought were covered by the protective order.

The court granted that part of Petitioner's motion that sought to intervene, but refused to modify its protective order to allow Petitioner to depose the witness and review the records and documents, deeming itself bound by previous decision of the Eighth Circuit.

## THE REASONS FOR GRANTING THE WRIT

This case presents a question suitable for review because the Eighth Circuit has implicitly held that it may exercise discretion in determining whether to apply the well recognized exception to the final order rule relating to denial of discovery in ancillary proceedings. Not only does such holding conflict with other Circuits, it creates the possibility of denial of justice to litigants in another circuit.

The Second Circuit Court of Appeals set forth the majority rule in *Republic Gear Co. v. Borg-Warner Corp.*, 381 F.2d 551 (2d Cir., 1967) at 554:

> "Where, as here, an order denying discovery is issued in a jurisdiction beyond that of the main proceeding, the party seeking discovery would have no effective remedy; even if the appellate court in the jurisdiction in which discovery is sought awaited a final decision in the main proceeding before acting at all it would be necessary to return to the ancillary appellate court to argue the discovery issue. And if, upon appeal, the party were successful in reversing the lower court's order and thus obtained discovery, he would be required to go back to the court where the main case had already been tried, and there with the discovery evidence now admissible on the merits, move to retry the case. The impracticality of this cumbersome procedure compels us to grant immediate appellate review of an order which, in another context, we might properly hold to have been an interlocutory order."

Accord: *Horizons Titanium Corporation v. Norton Company,* 290 F.2d 421 (1st Cir., 1961); *Ochsner v. Millis,* 382 F.2d 618 (6th Cir., 1967); *Carter Products, Inc., v. Eversharp, Inc.,* 360 F.2d 868 (7th Cir., 1966); *Premium Service Corp. v. Sperry & Hutchinson Co.,* 511 F.2d 225 (9th Cir., 1975); *Westinghouse*

*Electric Corporation v. City of Burlington, Vermont,* 351 F.2d 762 (D.C. Cir., 1965); 4 *Moore's Federal Practice,* ¶26.83[5].

The Eighth Circuit's dictum that the issues raised by Petitioner are similar to the issues raised on a prior appeal in the Iowa action, *Iowa Beef Processors, Inc. v. Bagley,* 601 F.2d 949 (8th Cir., 1979) Cert. den., 441 U.S. 907 (1979) creates the reviewable issue. On the prior appeal the issues were whether the district court erred in modifying its protective order allowing Hughes A. Bagley to comply with a subpoena issued by a House Sub-Committee, and whether the Eighth Circuit had appellate jurisdiction to review that order.

Thus, the Eighth Circuit, while recognizing the existence of the denial of discovery exception to the finality rule, has chosen not to apply it, because of its view of the correlation of issues on the two motions in the case pending in the Iowa Court.

That view of the case, however, overlooks the rationale of the exception; the prevention of the denial of justice to a party in litigation in another District Court. The Eighth Circuit, effectively exercising its discretion by not applying the exception to the finality rule, has vitiated the rule by such exercise. The balancing of the needs of the parties to the different litigations is appropriate when reviewing the merits of the appeal, not in determining appealability. That distinction is pertinent in this case, where Petitioner asked the Circuit Court for the alternative relief of a remand to the District Court for a further demonstration by Petitioner of the need for the relief sought.

Moreover, the concept of an exercise of discretion by the Circuit Court poses a threat to the exception to the finality rule in those situations where there are not two "main" litigations, but one case in chief and an ancillary discovery proceeding.

In either event, if the Circuit Court exercises discretion in applying the denial of discovery exception, whether there are one or more cases in chief, the litigant seeking discovery outside the jurisdiction of his district is subject to potential prejudice to his case by the denial of discovery without recourse to a Circuit Court.

In short, in view of the apparent conflict between the Eighth Circuit and other Circuits, and the potential vitiation of the denial of discovery exception by the Eighth Circuit's ruling, this Court should review the dismissal of Petitioner's appeal to the Eighth Circuit and define the efficacy of the denial of discovery exception to the finality rule, under 28 USC 1291.

## CONCLUSION

This petition for certiorari should be granted.

Respectfully submitted,

SHAW, LICITRA & LEVINE, P.C.
BY: J. STANLEY SHAW
A Member of the Bar of the
United States Supreme Court

# APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

---

IOWA BEEF PROCESSORS, INC.,

Plaintiff,

vs.

PATRICK E. GORMAN, HARRY R. POOLE, and SAM TALARICO, as representatives of the members of AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO; IRVING STERN; ALBERT J. KRIEGER; LEX HAWKINS; JOHN A. COCHRANE; HUGHES A. BAGLEY; and HANS AARSEN,

Defendants.

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NO. C 77-4040

**ORDER**

This matter is before the court on a number of different motions filed by some of the parties in this case. Order in accordance with opinion.

*Motion to Intervene*

On July 19, 1978, the Bohack Corporation (Bohack), a non-party to this case, filed its resisted motion to intervene permissively for the limited purpose of moving this

court to modify its February 13, 1978 protective order.[1]

Whether as a technical matter it be deemed a "motion to intervene" under FRCP 24, any non-litigant third party whose interests may be affected by an order of court is privileged to come before the issuing court to oppose or otherwise request a modification of that order. *Cf. O'Keefe v. Boeing Co.*, 38 FRD 329, 330 (S.D.N.Y. 1965). *Compare Martindell v. International Tel. & Tel. Corp.*, 594 F. 2d 291 (2d Cir. 1979). This appears to be what Bohack's motion, labeled "to intervene", seeks to accomplish. Thus, although it appears that Bohack's motion does not constitute a strict intervention as contemplated by FRCP 24, *O'Keefe, supra; but see Martindell, supra,* the court will nonetheless grant the motion as limited and will treat it as incorporating Bohack's further motion to modify the February 13, 1978 protective order to allow Bohack's deposition of and production of documents from Mr. Hughes A. Bagley, a defendant in this case.

With respect to the February 13, 1978 protective order, it must be initially noted that this court's prior

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1. The specific language of the Bohack Corporation's motion to intervene reads in pertinent part as follows:

> ". . . for the limited purpose of moving to modify a protective order in this case, compelling HUGHES BAGLEY to appear for deposition under oath, and to give testimony on behalf of the plaintiff and to produce for discovery and inspection such records and documents as are in his possession that relate to the issues in an action pending in the United States District Court, Eastern District of New York, captioned "THE BOHACK CORPORATION, plaintiff v. IOWA BEEF PRODUCTS (sic), INC., et al., ;defendants," 77 Civ. 1673, and modifying the protective order heretofore entered in this court on February 13, 1978."

In a separate action in the United States District Court for the Eastern District of New York involving Bohack and Iowa Beef Processors, Inc., District Judge Mishler denied on June 2, 1978 Bohack's motion to compel Bagley's deposition and production of documents. Judge Mishler's denial of Bohack's motion was grounded on his reluctance to issue an order that might affect or interfere with the February 13, 1978 protective order issued by this court. That denial is the motivating factor for Bohack's present motion in this court to intervene for purposes of moving to modify the court's February 13, 1978 protective order.

limited modification of the order in another context[2] has been vacated on appeal to the Eighth Circuit Court of Appeals. *See Iowa Beef Processors, Inc. v. Bagley,* No. 78-1855 (8th Cir., February 7, 1979). In furtherance of that appellate decision, the Eighth Circuit Court of Appeals mandated this court to reinstate the February 13, 1978 protective order in full.

The mandate was based in part upon the Appeals Court's view

> "That the documents ordered disclosed to the [House] Subcommittee [on SBA and SBIC Authority and General Small Business Problems] were an important part of the subject matter of the underlying lawsuit. That is, ISP [Iowa Beef Processors, Inc.] alleged that Bagley had breached both contractual and fiduciary obligations to IBP by disclosing the contents of these documents and sought an injunction preventing further disclosure and compelling the return to IBP of all such documents. In these circumstances, the district court should have maintained the status quo by carefully limiting disclosure of these documents pending determination of the merits of IBP's claim. The court's order allowing disclosure to the Subcommittee, without any limitation on its use of the documents, could well render moot in part IBP's claims for relief in the underlying lawsuit."
>
> *Id.,* at slip op. pp. 10-11.

---

2. On November 27, 1978, this court modified the February 13 protective order to permit the House Subcommittee on SBA and SBIC Authority and General Small Business Problems to obtain by subpoena documents held by defendant Hughes Bagley that were the subject of the protective order. Iowa Beef Processors, Inc. appealed that modification and the Eighth Circuit Court of Appeals vacated the modification order and remanded to this court "with instructions to reinstate in full the protective order entered on February 13, 1978."

That decision and rationale were seconded in the Appeals Court's opinion on a petition for rehearing. *See Iowa Beef Processors, Inc. v. Bagley,* No. 78-1855 (8th Cir., August 13, 1979).[3] *Compare also, Iowa Beef Processors, Inc. v. Bagley,* 588 F.2d 638 (8th Cir. 1978).

Thus, with respect to any and all requests for modification of its February 13, 1978 protective order, this court considers itself bound by the Eighth Circuit Court of Appeals' views. Bohack's motion for leave to intervene will be granted as limited and its motion to modify will be denied.

*IBP's Motion to Show Cause and Stay*

On November 30, 1978, plaintiff (IBP) filed its unresisted motion to order the House Subcommittee to return certain documents that were subject to a protective order or in the alternative to hold a show cause contempt hearing against defendant Hughes Bagley; and a further motion to order the House Subcommittee not to reveal the contents of those documents pending appeal of this court's order modifying the protective order in part, and for an order staying the modification order pending appeal. In conformance with the opinion of the Eighth Circuit Court of Appeals the protective order is reinstated in full and IBP's motion will be denied as otherwise moot.

On February 7, 1979, the Eighth Circuit Court of Appeals vacated this court's November modification order,

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3. Moreover, in its opinion on the petition for rehearing, the Appeals Court indicated:

> "We are confident that any future attempt by Bagley to seek permission to disclose any further information regarding these documents will be dealt with by the district court in accordance with the considerations discussed in our earlier opinion."

This court assumes the Appeals Court would express the same expectations with respect to this court's consideration of motions to modify made by intervening non-litigant third parties.

and remanded with instructions to reinstate the February, 1978 protective order "in full". *See, Iowa Beef Processors, Inc. v. Bagley, supra* (8th Cir., Feb. 7, 1979). The Appeals Court, however, did not grant IBP's request to order the House Subcommittee to return the documents obtained from Bagley, *id,*[4] and denied its request to stay this court's modification order pending appeal, *Iowa Beef, supra,* 588 F.2d at 639-41.

Under the present circumstances, the court deems itself bound by the Appeals Court's opinion. To clarify the matter, however, the court reiterates here its intent that the November, 1978 order modify the February, 1978 protective order only to permit the House Subcommittee to obtain the documents from Hughes Bagley. With that limited exception the February, 1978 protective order continues in full force. *See also, IBP, supra* Slip op. at p. 2 (8th Cir., August 13, 1979). The court, however, will not, as the Appeals Court did not, order the House Subcommittee to return the documents. Nor does the court deem either the House Subcommittee or defendant Bagley to be in contempt. In all other respects, it is the court's view of the matter that the Appeals Court's decisions have otherwise mooted IBP's November 30, 1978 motion and it will be denied as such.

### *IBP's Motion to Dismiss Hawkins' and Cochrane's Counterclaim*

On January 17, 1979, IBP filed an unresisted motion to dismiss defendants Hawkins' and Cochrane's joint counterclaim. The motion will be granted and the counterclaim dismissed.

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4. The February 7, 1979 appeals decision was affirmed in essence in the Appeals Court's opinion on a petition for rehearing. *See, IBP, Inc. v. Hughes A. Bagley,* No. 78-1855 (8th Cir., August 13, 1979).

On April 11, 1978, defendants Lex Hawkins and John Cochrane filed their joint answer incorporating therein their joint permissive counterclaim against IBP for abuse of process and tortious interference. Defendants, however, indicated that their sole purpose in filing the permissive counterclaim was to perfect in this court their claim against IBP as an alternative to their separate action, against IBP and two other named individuals, filed in the United States District court for the Southern District of Iowa.

The procedural history of Hawkins' and Cochrane's Southern District action is as follows. On July 22, 1977, Hawkins and Cochrane filed their complaint in the Southern District of Iowa, the subject matter of which mirrors their counterclaim in this action. On August 15, 1977, IBP and the two other named defendants in the Southern District action filed their motion to dismiss for improper venue. On November 17, 1977, the Honorable William C. Stuart, Chief Judge for the Southern District, granted the motion, which was appealed by Hawkins and Cochrane to the Eighth Circuit Court of Appeals. That appeal was still pending at the time of IBP's January 17, 1979 motion in this court to dismiss the counterclaim.

Since then, the Eighth Circuit Court of Appeals reached its decision affirming in part and reversing in part Chief Judge Stuart's dismissal order. *See Cochrane v. Iowa Beef Processors, Inc.*, 596 F.2d 254 (8th Cir. 1979). The Appeals Court's ruling was that the proper venue on Cochrane's claim was in the District of Minnesota while the proper venue on Hawkins' claim was in the Southern District of Iowa. *Id.* The Appeals Court also indicated that Hawkins' and Cochrane's joint counterclaim in this action was permissive rather than compulsory in nature. *Id.*

As a result of the appeals decision, on February 14, 1979, Cochrane filed his voluntary dismissal of his

counterclaim here, indicating that pursuant to the Appeals Court ruling he would file his claim in the United States District Court for the District of Minnesota. Hawkins, however, has not as yet indicated to this court his intentions with respect to the counterclaim.

In light of the Appeals Court ruling and Cochrane's voluntary dismissal of his counterclaim, IBP's motion to dismiss Cochrane's counterclaim will be denied as moot. Furthermore, since the Appeals Court ruled that venue on Hawkins' claim was properly laid in the Southern District of Iowa and that his counterclaim in this action was permissive rather than compulsory, IBP's motion to dismiss Hawkins' counterclaim will be granted. Cochrane and Hawkins' joint counterclaim will be ordered dismissed.[5]

*Defendants Gorman, Poole and Talarico's Motion to Compel Answers*

On October 23, 1978, defendants Gorman, Poole and Talarico filed their resisted motion to compel answers to interrogatories propounded to IBP on August 8, 1978. On September 13, 1978, IBP answered interrogatories Nos. 1 and 2 in full and No. 13 in part. IBP objected to interrogatories Nos. 3-12, and 14-15 in whole and to No. 13 in part, on grounds that they constitute "contention interrogatories" to which answers should be deferred until IBP has had an opportunity to complete its discovery. The court disagrees with IBP's characterization of the interrogatories and the motion to compel will be granted.

The objected-to interrogatories seek facts and other information from IBP which would tend to underlie the

5. This ruling appears to resolve Hawkins' and Cochrane's still pending January 26, 1979 motion for enlargement of time to file resistances to plaintiff's motion to dismiss their counterclaim. Thus, defdendants' January 26, 1979 motion for enlargement of time will be denied as moot.

allegations of IBP's amended complaint against these specific defendants. In ruling on a motion to compel answers, the court should consider the proper ends served by discovery which include expediting the litigation by narrowing the areas of controversy. *See, e.g., Union Carbide Corp. v. Travelers Indemnity Co.*, 61 FRD 411, 414 (W.D. Pa. 1973). Where it seems that there is at least a likelihood that useful evidence may be uncovered, answers to interrogatories should be compelled. *See, id.* at 413; *compare also Scovill Mfg. Co. v. Sunbeam Corp.*, 61 FRD 598, 600-01 (D. Del. 1973).

With these general considerations in mind, the court is of the opinion that answers to these interrogatories should be compelled at this stage of discovery proceedings. Thus, defendants' motion will be granted and IBP ordered to answer in full interrogatories Nos. 3 through 15, inclusively. With respect to defendants' request for expenses and attorney's fees under FRCP 37(a)(4), the court finds that IBP's opposition to the motion was substantially justified. FRCP 37(a)(4). Thus, defendants' request for expenses and fees will be denied.

*IBP's Motion for Sanctions*

On September 7, 1978, IBP filed its resisted motion for sanctions[6] against defendants Hawkins and Cochrane

6. IBP's motion is accompanied by an affidavit pursuant to Local Rule 16E, indicating that voluntary compliance has been sought and is unavailing. Local Rule 16E states:

> "Affidavit Required: No motion relating to depositions and discovery shall be filed by the Clerk unless counsel for the moving party files therewith an affidavit of counsel certifying that he has conferred with counsel for the opposing party in good faith to resolve by agreement the issues raised by the motion without the intervention of the court, has been unable to reach such agreement and that the resulting motion is therefore contested."

for allegedly refusing to comply with this court's February 13, 1978 order compelling compliance with IBP's October 7, 1977 "First Request for Production of Documents." The documents sought by IBP are:

> (1) Documents concerning Hawkins' and Cochrane's two meetings with defendant Bagley in January, 1977, to wit:
>
> (A) Documents received from Bagley and, if different, documents marked as Exhibit 3 by Hawkins at a May 10, 1977 hearing before Judge Hanson;
>
> (B) Notes taken by Hawkins or Cochrane at either of two meetings held January 11 or 30, 1977, and Hawkins' subsequent memorandum of his talks with Bagley;
>
> (C) Notes on a yellow pad of paper—or any other documents—that Hawkins used in interrogating Bagley [at such meetings in January, 1977].
>
> (2) Notes of interviews of former Iowa Beef Processors, Inc. employees other than Bagley.
>
> (3) Documents concerning Hawkins' and Cochrane's conversations with economists for Amalgamated Meat Cutters and Butcher Workmen of America."

IBP contends that these documents were ordered produced by this court's order of February 13, 1978; in which the court overruled Hawkins' and Cochrane's work product and attorney-client privilege objections. *See,* Order, *Iowa Beef Processors, Inc. v. Gorman, et. al.,* No. C

77-4040 (N.D. Iowa, February 13, 1978).[7] IBP's position, therefore, is that since Hawkins and Cochrane have allegedly failed to produce these documents they are in violation of that court order and should be sanctioned pursuant to FRCP 37(b)(2).

In resistance, Attorney Glenn L. Norris asserts by affidavit that on April 18, 1978 the documents referred to in (1)(A), *supra,* were in fact produced for IBP in a "Blue Notebook" of 100 pages. Based on this affirmation, the court will consider this sufficient compliance with the February 13, 1978 order and to that extent the motion for sanctions will be denied.

The motion will likewise be denied based upon Attorney Norris' further affirmation that the documents referred to in (1)(C), (2) and (3), *supra*, have never existed.[8]

With respect to documents (Notes) referred to in category (1)(B), *supra*, Attorney Norris further affirms that Cochrane has never taken any notes at either the January 11 or 30, 1977 meeting with Bagley. He does affirm, however, that Hawkins did take such notes from

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7. The grounds for that ruling, however, were that defendants Hawkins and Cochrane failed to bear their burden of particularizing their work-product and attorney-client privilege objection. *See* Slip Opinion at pp. 8-9. It appears, however, that in resisting IBP's present motion for sanctions these defendants have attempted to remedy that failure by more specifically particularizing their objections. Thus, the court views Hawkins' and Cochrane's present resistances as incorporating a renewal of their previously overruled objections and considers them with more detail in this opinion.

8. With respect to documents referred to in category No. (2) *supra*, defendants represent to the court that they have not made notes of interviews with former IBP employees other than Bagley. They do indicate that notes of such interviews were made by others. The court takes this to mean that neither are such notes (made by others) in these defendants' possession. To that extent, of course, they are not able and, therefore, will not be required to produce such notes.

which Hawkins subsequently prepared a typed memorandum. Mr. Norris indicates that the underlying handwritten notes have been destroyed because no longer needed[9] but that the memorandum still exists. He has submitted that memorandum to the court under seal (Hawkins' Ex. B attached to Attorney Norris' affidavit filed October 18, 1978) for *in camera* inspection. Attorney Norris, on behalf of his client Hawkins, strenuously objects to production of this document on grounds that it constitutes Hawkins' attorney work-product prepared for use in separate Multi-District Antitrust Litigation in the Northern District of Texas and as such is privileged and not discoverable.[10]

The court has closelyr eviewed the memorandum exhibit and is of the opinion that it constitutes as a whole attorney opinion work-product. It is in essence an integrated memorandum and summary of Hawkins' own mental impressions garnered from the January, 1977 interviews with defendant Hughes Bagley and not a mere compilation of

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9. IBP contends that if such notes were destroyed, they were done so to evade this court's February 13, 1978 order since IBP's information is that they in fact still existed as of April 19, 1978, some two months after the order. The court is not persuaded that this was in fact the situation or that the destruction was a purposeful evasion of the court's order. Even if it were, however, it appears to the court that imposing sanctions upon Hawkins for what in effect is "spilled milk" would serve no good purpose absent some strong indication (not now before the court) of perversity on Hawkins' part. Moreover, the fact a memorandum of the notes still exists and is now in the court's possession for *in camera* inspec;tion argues against the imposition of sanctions for destruction of the underlying handwritten notes. Moreover, sanctions are not indicated since, in the court's opinion, the memorandum itself is privileged attorney work-product and not discoverable. *See* text of opinion at p. 11, *infra.*

10. In the alternative, Hawkins'r esistance incorporates his request that should the court rule the memorandum discoverable in whole or in part, that the court delay disclosure to IBP for 14 days to permit Hawkins to perfect an appeal of such a ruling to the Eighth Circuit Court of Appeals.

facts elicited from Bagley. As such it is not discoverable. *See, e.g., United States v. Pfizer,* 560 F.2d 326, 333-39 (8th Cir. 1977). In light of the above, IBP's September 7, 1978 motion for sanctions will be denied.

In accordance with all the above,

It is therefore

ORDERED

1. The Bohack Corporation's July 19, 1978 motion to intervene granted for the limited and sole purpose of moving this court to modify its February 13, 1978 protective order. Bohack's motion to modify the protective order denied.

2. Plaintiff's November 30, 1978 motion "to show cause and stay" denied as moot.

3. Plaintiff's January 17, 1979, motion to dismiss defendants Hawkins' and Cochrane's counterclaim is granted. Hawkins' and Cochrane's January 26, 1979 motion for enlargement of time is denied as moot.

4. Defendants Gorman, Poole and Talarico's October 23, 1978 motion to compel granted. Plaintiff shall answer defendants' August 8, 1978 interrogatories Nos. 3-15 in full by not later than October 22, 1979. Defendants' request for expenses and fees in procuring this order denied.

5. Plaintiff's September 7, 1978, motion for sanctions against defendants Hawkins and Cochrane denied. In accordance with the court's opinion, defendants Cochrane and Hawkins need not produce for plaintiff the "notes and memorandum" documents referred to in category (1)(B), *supra.*

September 25, 1979.

s/Edward J. McManus
Edward J. McManus, Chief Judge
UNITED STATES DISTRICT COURT

## APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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No. 79-1889

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Iowa Beef Processors, Inc.,

Appellee,

v.

Patrick E. Gorman, Harry R. Poole, and Sam Talarico, as representatives of the members of Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO; Irving Stern; Albert J. Krieger; Lex Hawkins; John A. Cochrane; Hughes A. Bagley; and Hans Aarsen.

The Bohack Corporation,

Appellant.

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Appeal from the United States District Court
for the Northern District of Iowa

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Submitted: February 14, 1980
Filed: February 28, 1980

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Before BRIGHT, STEPHENSON and McMILLIAN, Circuit Judges.

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PER CURIAM.

In *Iowa Beef Processors, Inc. v. Bagley*, 601 F.2d 949 (8th Cir.), *cert. denied*, 441 U.S. 907 (1979), this court vacated an order of the district court modifying an earlier protective order that covered allegedly confidential business information, and directed that the protective

order be reinstated in full. We explained that we lacked appellate jurisdiction in that case not only under 28 U.S.C. §§1291 and 1292, but also under the collateral order doctrine of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). We nonetheless issued mandamus under authority of the All Writs Act, 28 U.S.C. §1651(b), which was "meant to be used only in the exceptional case where there is a clear abuse of discretion of 'usurpation of judicial power.' " 601 U.S. 379, 383 (1953). Subsequently, we modified our opinion to deny formal issuance of the writ, concluding that that was improvident. 601 F.2d at 956.

Now the Bohack Corporation, appearing as intervenor-appellant, appeals a further order of the district court denying appellant's motion to modify the protective order.[1] Specifically, appellant seeks clarification of this court's prior orders and a ruling that the district court may modify its protective order to accommodate appellant's request for discovery.

Clearly the order complained of is a nonfinal interlocutory action appealable, if at all, only upon certification by the district court pursuant to 28 U.S.C. §1292(b). No such certification is shown, and thus we dismiss for lack of jurisdiction.[2]

A true copy.

ATTEST:
CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

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[1]The district court granted that part of intervenor-appellants' motion requesting that it be allowed to intervene, but denied that portion of the motion seeking modification of the protective order.

[2]While acknowledging that the order in question is not final, appellant urges us to recognize an exception to the general requirement of finality in cases where, as here, a request for discovery is denied in an ancillary forum. *See e.g., Premium Service Corp. v. Sperry & Hutchinson Co.*, 511 F.2d 225 (9th Cir. 1975); *Republic Gear Co. v. Borg-Warner Corp.*, 381 F.2d 551 (2d Cir. 1967); *Westinghouse Electric Corp. v. City of Burlington*, 351 F.2d 762 (D.C. Cir. 1965); 4 Moore's Federal Practice ¶26.83[5] (1979). We believe, however, that this is not an appropriate case to apply the exception. The issues raised here are closely akin to those presented in the underlying litigation and only recently considered by this court in *Iowa Beef Processors v. Bagley, supra. Cf. Westinghouse Electric Corp. v. City of Burlington, supra*, 351 F.2d at 766 (issues involved were separable from those involved in the main case).

Appellant raiss no claim under the All Writs Act, and we see no basis for applying that Act here.